Wong Thean Chye & Ors v Junimas Sdn Bhd

HIGH COURT (PULAU PINANG) — SUITS NO 22-243, 22-419 OF 1997 AND 22-203 OF 1998
SU GEOK YIAM JC
25 FEBRUARY 2003

Land Law *— Housing Developers — Delay in completion — Plaintiffs brought action for delay in completion of the dwelling units and common facilities and failure to construct certain common facilities — Plaintiffs executed loan cum assignment with bank — Whether assignment absolute — Whether plaintiffs had locus standi to bring proceedings in their own names*

The plaintiffs were the purchasers of dwelling units in a block of apartments with common facilities on lands developed by the defendant. The plaintiffs, subsequently, executed with the defendant's consent, loan agreements cum assignments ('the assignment') in which the word 'absolutely' was used in favor of the bank in return for housing loans to finance their purchase of the said dwelling units from the defendant. The plaintiffs were seeking for, inter alia, various declarations and liquidated damages in respect of numerous alleged breaches of the sale and purchase agreements by the defendant, inter alia, in not completing the dwelling units and common facilities within the time frame specified in the sale and purchase agreements and in failing to construct certain common facilities. The defendant contended, inter alia, that the plaintiffs had no right or locus standi to bring the proceedings in their own names.

Held:

(1) The intention of the parties as expressed therein was for the assignment to be conditional only being by way of a security and not for the assignment to be an absolute assignment to the bank whereby the plaintiffs transferred all their rights and interests in the said dwelling units to the bank. This was borne out by the use of various words in the assignment (see p 421A–B); *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 1 MLJ 265 followed.

(2) In all the assignments, the bank was only interested in the due repayment of the housing loans by the borrowers, to wit, the plaintiffs. The bank was certainly not concerned with the delay in the completion of the dwelling units nor the common facilities nor the alleged numerous breaches by the defendant. Whatever may happen to the property, the plaintiffs were still bound by their covenants to repay the bank as set out in the assignment. By contrast, the plaintiffs would be gravely prejudiced by delays in the completion of the said dwelling units and common facilities and any breaches of the sale and purchase agreements by the

defendant. The plaintiffs were legally competent to institute proceedings against the defendant in their own names as the bank had given its consent (see pp 422I–423B); *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 498 and *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1 MLJ 553 followed.

[Bahasa Malaysia summary

Plaintif-plaintif merupakan pembeli-pembeli unit-unit kediaman di dalam sebuah blok apartmen dengan kemudahan awam di atas tanah yang dibangunkan oleh defendan. Plaintif-plaintif kemudian melaksanakan dengan izin defendan perjanjian pinjaman merangkap serahhak ('serahhak tersebut') di mana perkataan 'absolutely' digunakan memihak bank untuk pinjaman perumahan untuk membiayai pembelian unit-unit kediaman itu daripada defendan. Plaintif-plaintif memohon, antara lain, deklarasi-deklarasi dan ganti rugi jumlah tertentu berkenaan pelanggaran-pelanggaran perjanjian jual beli oleh defendan yang dikatakan, antara lain, kerana tidak menyiapkan unit-unit kediaman dan kemudahan-kemudahan awam di dalam jangka masa yang ditentukan di dalam perjanjian-perjanjian jual beli , dan juga kerana telah gagal membina kemudahan-kemudahan awam tertentu. Defendan berhujah, antara lain, bahawa plaintif-plaintif tidak mempunyai hak atau locus standi untuk membawa prosiding-prosiding di dalam nama mereka.

Diputuskan:

(1) Niat parti-parti seperti yang dinyatakan di dalam adalah supaya serahhak tersebut bersyarat, hanya merupakan jaminan dan bukan serahhak mutlak kepada bank di mana plaintif-plaintif memindah hak-hak dan kepentingan-kepentingan mereka di dalam unit-unit kediaman kepada bank. Ini telah ditunjukkan melalui penggunaan perkataan-perkataan di dalam serahhak itu (lihat ms 421A–B); *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 1 MLJ 265 diikut.

(2) Di dalam segala serahhak bank hanya berminat di dalam pembayaran balik pinjaman perumahan oleh peminjam-peminjam, iaitu, plaintif-plaintif. Bank tidak mementingkan kelewatan di dalam penyiapan unit-unit kediaman itu atau kemudahan-kemudahan awam atau kemungkiran perjanjian oleh defendan yang dikatakan. Walau apapun yang berlaku kepada hartanah itu, plaintif-plaintif tetap terikat oleh waad untuk membayar balik bank seperti yang dinyatakan di dalam serahhak. Sebaliknya, plaintif-plaintif akan diprejudiskan dengan serius oleh kelewatan di dalam penyiapan unit-unit kediaman tersebut dan kemudahan-kemudahan awam dan sebarang kemungkiran perjanjian-perjanjian jual beli oleh defendan. Plaintif-plaintif adalah kompeten di sisi undang-undang untuk memulakan

prosiding terhadap defendan di dalam nama mereka memandangkan bank telah memberi izinnya (lihat ms 422I–423B); *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 498 dan *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1 MLJ 553 diikut.

Notes

For cases on delays in completion, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), para 2450.

Cases referred to

Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd [1997] 3 MLJ 620 (refd)

Durham Brothers v Robertson [1898] 1 QB 765 (refd)

Max-Benefit Sdn Bhd v Phuah Thean An & Anor [2001] 1 MLJ 553 (folld)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (folld)

Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd [1999] 6 MLJ 220 (refd)

Sakinas Sdn Bhd v Siew Yik Hau & Anor [2002] 5 MLJ 498 (folld)

Legislation referred to

Civil Law Act 1956 s 4(3)
National Land Code
Rules of the High Court 1980 O 33 r 2

Zaireen bte Zainal (*Thevin Chandran & Assoc*) for the plaintiffs.
Dato' Lakhbir Singh Chahl (*Lakhbir Singh, Yagoo & Assoc*) for the defendants.

Su Geok Yiam JC: There are three cases altogether, namely GS No 22–243–97, GS No 22–419–97 and GS No 22–203–98 which involve the same defendant but different plaintiffs.

Facts and background

In all the three cases, the defendant is the developer and the plaintiffs are the purchasers of dwelling units in a block of apartments with common facilities on lands developed by the defendant which development is known as the 'Kayangan Puri Mutiara', located in Medan Fettes, 11200 Pulau Pinang.

In Civil Suit GS No 22–243–97, the plaintiffs are the beneficial owners of apartment No 90–05–06 which corresponds to parcel No 4, Storey 3, Block Cahaya, Kayangan Puri Mutiara.

In Civil Suit GS No 22–419–97, the plaintiffs are the beneficial owners of apartment No 88–2–7 which corresponds to parcel No 15, Storey 2, Block Awan, Kayangan Puri Mutiara.

In Civil Suit GS No 22–203–98, the plaintiffs are the beneficial owners of apartment No 84–4–02 which correspond to parcel No 10, Storey 4, Block Awan, Kayangan Puri Mutiara.

Loan agreement cum assignments

The plaintiffs subsequently executed with the defendant's consent loan agreements cum assignments in which the word 'absolutely' is used, in favor of Standard Chartered Bank Malaysia Bhd in respect of Civil Suits GS No 22–243–97 and GS No 22–419–97 and Ban Hin Lee Bank Bhd in respect of Civil Suit GS No 22–203–98 ('the bank') in return for housing loans to finance their purchase of the said dwelling units from the defendant. A copy of the respective loan agreement cum assignment is exhibited in the defendant's respective supporting affidavit as exhibit 'TEH-3' in respect of Civil Suit GS No 22–419–97 and exhibit 'TEH-2' in respect of Civil suit GS No 22–243–97 and GS No 22–203–98.

Sale and purchase agreements

By the respective sale and purchase agreements exhibited in the defendant's respective supporting affidavit as exhibit 'TEH-1' entered into between the plaintiffs and the defendant in 1990 in respect of the said dwelling units, the defendant had covenanted to deliver vacant possession to the plaintiffs and also complete the common facilities within specified dates, failing which the defendant would be liable to pay to the plaintiffs liquidated damages calculated at 10% of the purchase price of the said dwelling units for the duration of the delay.

Plaintiffs' writ of summons and statements of claim

In their writ of summons and statements of claim, the plaintiffs are seeking for, inter alia, various declarations and liquidated damages in respect of numerous alleged breaches of the sale and purchase agreements by the defendant, inter alia, in not completing the dwelling units and common facilities within the time frame specified in the sale and purchase agreements, and in failing to construct certain common facilities such as a jogging track, a surau, swimming pools, etc.

Defendant's statements of defence and counterclaims

In their statements of defence and counterclaim, the defendant contends, inter alia, that the plaintiffs have no right or locus standi to bring the proceedings against the defendant and that the defendant did not commit any breaches of the sale and purchase agreements. The defendant also counterclaimed for various sums from the plaintiffs being arrears of service charges in respect of the common facilities.

Preliminary issue — Whether the plaintiffs have locus standi to sue in their own names

In all the three cases, the defendant filed a similar application pursuant to O 33 r 2 of the Rules of the High Court 1980 seeking, inter alia, the court's determination of the following identical preliminary issue, partly of fact and partly of law: whether the plaintiff has the locus standi to bring the proceedings against the defendant in his own name.

In the event the court rules in favor of the defendant, the defendant prays that the court strike out the plaintiff's claim.

In Civil Suit GS No 22–243–97, the application is at encl (14) and it is supported by the affidavit of the defendant affirmed by Teoh Ean Hooi, the defendant's managing director, on 23 May 2002 (encl (13)). In Civil Suit GS No 22–419–97, the application is at encl (11) and it is supported by the affidavit of the defendant also affirmed by Teoh Ean Hooi, the defendant's managing director, on 23 May 2002 (encl (10)). In Civil Suit GS No 22–203–98, the application is at encl (10) and it is supported by the affidavit of the defendant affirmed by Teoh Ean Hooi, the defendant's managing director, on 23 May 2002 (encl (9)).

On 31 October 2002, Dato' Lakhbir Singh, learned counsel for the defendant in all the three cases, informed the court that both parties have agreed to proceed with Civil Suits GS No 22–243–97 and GS No 22–419–97 first and to await the decision of the court in the two cases before proceeding with the third case, Civil Suit GS No 22–203–98.

Decision of the court

On 11 December 2002, after having considered the respective affidavits filed by the plaintiffs and defendant in both the cases, the oral and written submissions of both Dato' Lakhbir Singh Chahl, the learned counsel for the defendant, and Pn Zaireen bte Zainal, the learned counsel for the plaintiffs, and the various authorities cited by them, the court ruled in favor of the plaintiffs and dismissed the defendant's application with costs in the cause.

Both parties then prayed that the court rule on the defendant's application (encl (10)) in the third case, GS No 22–203–98. The court, accordingly, ruled that the question posed should be in the affirmative.

The defendant being dissatisfied with the order of the court initially filed a notice of appeal to the Court of Appeal in respect of all three cases. Subsequently, the defendant has withdrawn its notice of appeal in respect of Civil Suit GS No 22–419–97.

Whether assignment absolute or conditional

The reasons why the court decided the preliminary legal issue in favor of the plaintiffs are as follows.

Upon applying the statement of principle in the Federal Court case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268, that whether or not an assignment is an absolute one (not purporting

to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered from the four corners of the instrument itself, and upon a proper construction and interpretation of the wording used in the loan agreement cum deed of assignment in order to determine the intention of the parties, the court was satisfied that the intention of the parties as expressed therein was for the assignment to be conditional only being by way of a security and not for the assignment to be an absolute assignment to the bank whereby the plaintiffs transferred all their rights and interests in the said dwelling units to the bank.

This is borne out by the use of various words in the assignment, for eg the words 'upon security of an assignment' used in the recital, the reference to 'separate document[s] of title' in respect of the said dwelling units which have yet to be issued in the recital, the words 'money hereby secured' in cl 11(b), (c) and (d), the words 'the security' in cl 15, the words 'the money hereby secured' in cl 23, the words 'any money intended to be hereby or otherwise secured' in cl 23, the words 'this security' in cl 27 and the words 'the security hereby created' in cl 44.

In my judgment, apart from the above, there is also an extremely important and significant clause in the assignment which expressly provides that upon the issue of the individual strata titles to the said dwelling units the plaintiffs shall, at their own cost and expense and upon being required by the bank, take a transfer of the individual strata titles and execute a statutory charge in the form prescribed in the National Land Code 1965 in favor of the bank to secure the repayment to the bank of the balance of the loan due and all other moneys together with interest thereon payable by the plaintiffs to the bank.

In respect of Civil Suits GS No 22–243–97, GS No 22–419–97 and GS No 22–203–98, the clauses concerned are cll 18(b), 4.05 and 11 respectively.

The three clauses are reproduced as follows:

18 COVENANT TO CHARGE

(a) ...

(b) Upon issue of a separate document of title to the said property or the strata title to the said property by the relevant authority the borrower shall at its own cost and expense and upon being so required to do by notice in writing from the Bank take a transfer of and execute a charge over the strata title to the said property, such charge to be in such form acceptable to the Bank in favor of the Bank to secure the repayment to the Bank of the balance of the loan then due and all other monies together with interest thereon at the prescribed rate payable and owing by the borrower to the Bank under and by virtue of this agreement at the date of the execution of such charge.

Section 4.05

EXECUTION OF CHARGE

Upon the issue of separate document(s) of title to the said property by the relevant governmental authorities, the Assignor shall at its own cost and expense and immediately upon being so required to do so by notice in writing

from the Bank take a transfer of the said Property and immediately deliver and deposit or cause to deliver and deposit with the Bank or its solicitors the relevant document(s) of title and Memorandum or Memoranda of Transfer and all other documents together with all necessary stamp and registration fees for effecting the registration thereof free from encumbrances and shall at the Assignor's own cost and expense immediately execute a statutory charge in the form prescribed under the National Land Code over the separate document(s) of title to the said property such charge to be in form and substance prescribed by the Bank at its sole and absolute discretion in favor of the Bank to secure the repayment to the Bank of the balance of all principal sums then due and all other moneys together with interest thereon payable and owing by the Assignor and or any Security Party to the Bank.

11 REGISTRATION OF CHARGE

When the Assignor(s) is/are entitled under the Sale and Purchase agreement to present for registration at the appropriate Land Registry the Memorandum of Transfer in respect of the said property in his/her/their/its favor and upon being required so to do by notice in writing from the Bank the Assignor(s) shall forthwith at is own costs and expense take all necessary steps to have the said Memorandum of Transfer registered in his/her/their/its favor and execute a Memorandum of Charge in such form and content as the Bank may in its absolute discretion decide and have the same registered in favor of the Bank ('the Charge').

Clause 5.01 of the assignment in Civil Suit GS No 22–419–97 also provides additionally that in the event that individual titles are issued in respect of the said dwelling units, the bank shall have custody of the individual strata titles for the duration of the assignment. By this clause, the individual titles, once issued, will be retained by the bank as further security for the loan.

By these clauses taken together with the words and expressions already referred to above in this judgment and the respective clauses in which they are found the court is convinced that the parties intended that each of the assignment is nothing more than an 'equitable chose in action' which will expire and revert back to the plaintiffs being the assignors when the plaintiffs have fully repaid their housing loans, which event is uncertain in nature, whereupon the plaintiffs will be entitled to a discharge and release of the said dwelling units from the bank or upon the due execution of a valid charge over the dwelling units in favor of the bank when the individual strata titles are available, which event is, again, uncertain in nature.

The court rejected the defendant's contention that the word 'absolutely' used in cl 4.01 of the assignment in Civil Suit GS No 22–419–97 and in cl 6 of the assignment in Civil Suits GS No 22–243–97 and GS No 22–203–98 show that it is the intention of the parties to render the assignment an absolute assignment as opposed to an assignment executed by way of security only, being a device created solely in order to achieve as similar a purpose as a charge on the title in respect of a landed property or a charge on the strata title or title in mid-air, in respect of property such as a flat or apartment.

In all the assignments, the bank is only interested in the due repayment of the housing loans by the borrowers, to wit, the plaintiffs. The bank is

certainly not concerned with the delay in the completion of the dwelling units nor the common facilities nor the alleged numerous breaches by the defendant.

This is so because whatever may happen to the property the plaintiffs are still bound by their covenants to repay the bank as set out in the assignment. By contrast, the plaintiffs will be gravely prejudiced by delays in the completion of the said dwelling units and common facilities and any breaches of the sale and purchase agreements by the defendant. In my judgment, the plaintiffs are legally competent to institute proceedings against the defendant in their own names as the bank has given its consent.

With respect, I adopt the following view as expressed by Abdul Aziz Mohamad J (now JCA) in the case of *Sakinas Sdn Bhd v Siew Yik Hau & Anor* [2002] 5 MLJ 498 at p 508:

> The actual phraseology does not matter. I would take that to mean that if the assignment were to use the word 'absolutely' it would not fall within s 4(3) of the CLA [Civil Law Act 1956] if the *intention was to give a charge only.* (Emphasis added.)

the following view of KC Vohrah J (as his Lordship then was) in *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1 MLJ 553, at p 556:

> Although the assignment is stated to be absolute in effect it is not. The assignment was purely for the *purpose of securing the loan.* What I have adverted to shows that there was a loan which the assignors-purchasers had taken from the bank and that the loan had to be repaid over a period of time and that the rights and interests over the property were assigned as surety *to ensure that the loan will be repaid.* The loan or any balance or part of it was given 'upon the security of the same property'. (Emphasis added.)

the following view of Clement Skinner JC (as his Lordship then was) in *Pak Ki Yau & Anor v Kumpulan Promista Sdn Bhd* [1999] 6 MLJ 220 at p 227:

> ... despite the fact that the word 'absolutely' is used in the assignment clause (cl 4), there are *other clauses* which *show that the full and entire benefit of the sale agreement and all rights, title and interests of the appellants therein have not been transferred to the respondent.* (Emphasis added.)

and the following view of Augustine Paul J in the case of *Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd* [1997] 3 MLJ 620, at p 636 following the decision in the English case of *Durham Brothers v Robertson* [1898] 1 QB 765:

> ... the assignment is to continue only till the full repayment of the loan and interest. On repayment of the loan and interest, the assignment comes to an end. The repayment of the loan advanced is an uncertain event and makes the *assignment conditional.* This would involve the defendant in the state of the accounts between the plaintiff and the assignor. Accordingly, it is my view that the *assignment is not absolute.* (Emphasis added.)

In the premises, the court answered the preliminary issue in the affirmative and, consequently, dismissed all the three applications of the defendant

with costs in the cause as the court was satisfied that all the three assignments were conditional assignments. A

Order accordingly.

Reported by Peter Ling

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